BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

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APPLICATION FOR BENEFICIAL WATER USE PERMIT NO. 41S 30150713 BY JAMES E. AND LORRAINE H. PETERSON	)))	**PRELIMINARY DETERMINATION TO GRANT PERMIT**

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On December 10, 2020, James E. and Lorraine H. Peterson (Applicants) submitted Application for Beneficial Water Use Permit No. 41S 30150713 to the Lewistown Water Resources Regional Office of the Department of Natural Resources and Conservation (Department or DNRC) for 35 gallons per minute (GPM) and 42.01 acre-feet (AF) for the purpose of Stock. The Department published receipt of the Application on its website. The Application was determined to be correct and complete as of April 12, 2021. An Environmental Assessment for this Application was completed on May 12, 2021.

INFORMATION

The Department considered the following information submitted by the Applicant, which is contained in the administrative record.

Application as filed:

- Application for Beneficial Water Use Permit, Form 600, including maps and attachments
    - Aquifer Testing Addendum and supplement
    - Well logs (Attachments A and D)
    - Peterson Well Long-Term Hydrograph (Attachment B)
    - Applicant's Request for Variance to Aquifer Testing Requirements (Attachment C)
    - Form 633 (Attachment E - electronic disc)
    - Preliminary Hydraulic Assessment (Attachment F)
    - Pump Specifications (Attachment G)

Information Received after Application Filed

- Email exchange between Scott Irvin (DNRC) and Jamie Graham (consultant) clarifying two questions from the Department's review of the application, February 2021.

Information within the Department's Possession/Knowledge

- Aquifer Test Report, dated February 12, 2021, by Attila Folnagy, Groundwater Hydrologist, DNRC Water Management Bureau
- Depletion Report, February 12, 2021, by Attila Folnagy, Groundwater Hydrologist, DNRC Water Management Bureau
- Department records of existing water rights
- Department's Variance to Aquifer Testing Requirements, memo dated February 3, 2021
- Department Groundwater Permit Application Technical Report, dated April 21, 2021
- The Department also routinely considers the following information, which is not included in the administrative file for this Application but is available upon request. Please contact the Lewistown Regional Office at 406-538-7459 to request copies of the following documents.
    - Technical Memorandum: Physical and Legal Availability of Ground Water dated April 22, 2019
    - Technical Memorandum: Net Surface Water Depletion from Ground Water Pumping dated July 6, 2018
    - Technical Memorandum: Physical Availability of Surface Water with Gage Data dated November 1, 2019

The Department has fully reviewed and considered the evidence and argument submitted in this Application and preliminarily determines the following pursuant to the Montana Water Use Act (Title 85, chapter 2, part 3, MCA).

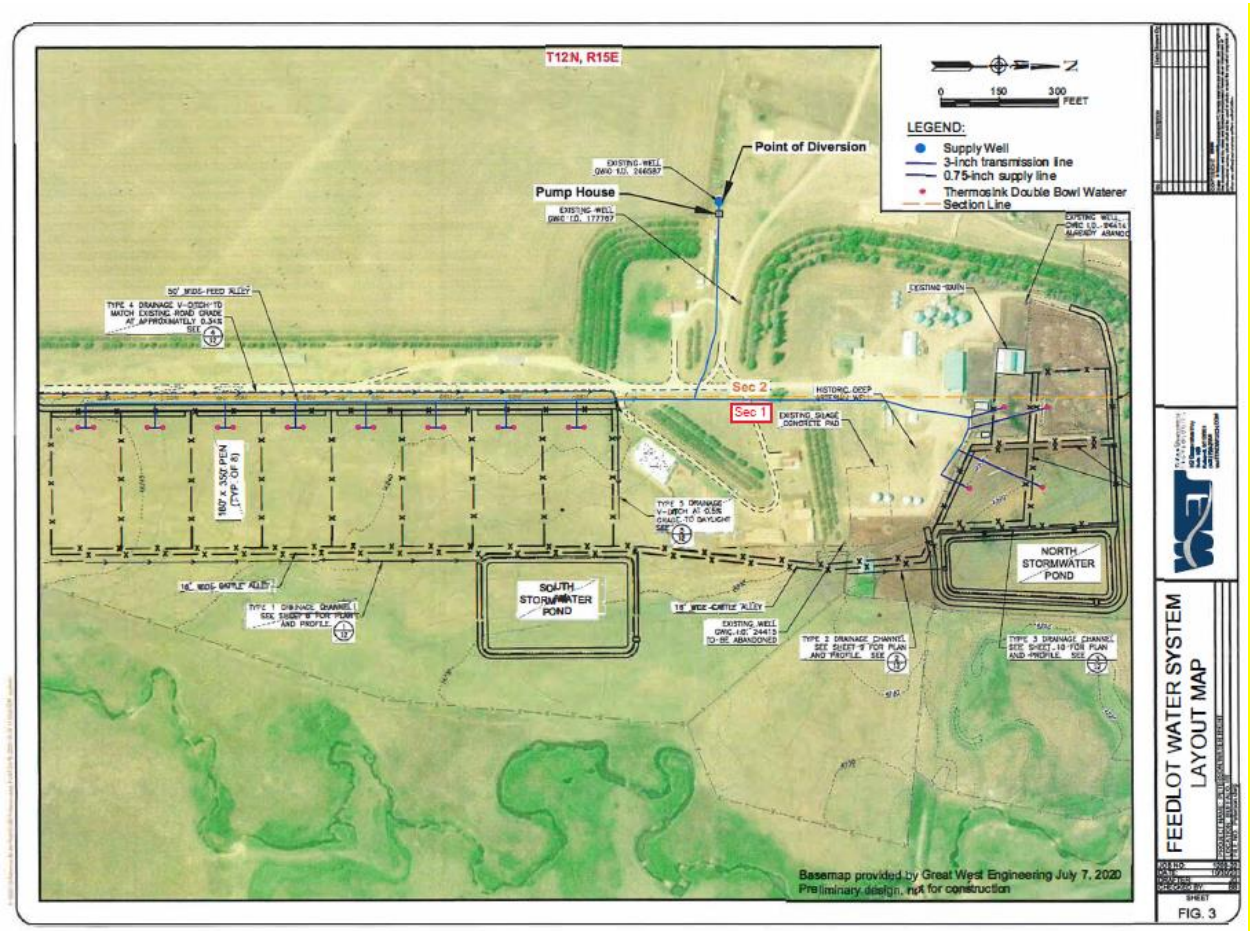
PROPOSED APPROPRIATION

FINDINGS OF FACT

1. The Applicant proposes to divert groundwater from the Third Cat Creek Member of the Kootenai Formation, by means of a 2,003-foot deep well, from January 1 to December 31, at a flow rate of 35 GPM and volume of up to 42.01 AF annually. The project is located about 10

miles north of Judith Gap, Montana. The groundwater well is located in the NENESE Section 2, T12N, R15E. The well will supply a concentrated animal feedlot operation encompassing approximately 15 acres of land (place of use) in the W1/2 Section 1, T12N, R15E. The purpose of use is Stock, and the estimated average animal occupancy rate of the feedlot operation is 2,500 cattle. Application.

2. The proposed means of diversion is an existing groundwater well, previously authorized under Groundwater Certificate No. 41S 30063553.[1] The volume of water requested under the proposed appropriation (42.01 AF) is in addition to the existing appropriation (up to 10 AF).



[1] As part of their ranch operations, James and Lorraine Peterson (Applicants in this matter) use the groundwater well to supply water to several stock tanks to serve their range cattle.

§ 85-2-311, MCA, BENEFICIAL WATER USE PERMIT CRITERIA

GENERAL CONCLUSIONS OF LAW

3. The Montana Constitution expressly recognizes in relevant part that:

> (1) All existing rights to the use of any waters for any useful or beneficial purpose are hereby recognized and confirmed.
> (2) The use of all water that is now or may hereafter be appropriated for sale, rent, distribution, or other beneficial use . . . shall be held to be a public use.
> (3) All surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law.

Mont. Const. Art. IX, §3. While the Montana Constitution recognizes the need to protect senior appropriators, it also recognizes a policy to promote the development and use of the waters of the state by the public. This policy is further expressly recognized in the water policy adopted by the Legislature codified at § 85-2-102, MCA, which states in relevant part:

> (1) Pursuant to Article IX of the Montana constitution, the legislature declares that any use of water is a public use and that the waters within the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided in this chapter. . . .
> (3) It is the policy of this state and a purpose of this chapter to encourage the wise use of the state's water resources by making them available for appropriation consistent with this chapter and to provide for the wise utilization, development, and conservation of the waters of the state for the maximum benefit of its people with the least possible degradation of the natural aquatic ecosystems. In pursuit of this policy, the state encourages the development of facilities that store and conserve waters for beneficial use, for the maximization of the use of those waters in Montana . . .

4. Pursuant to § 85-2-302(1), MCA, except as provided in §§ 85-2-306 and 85-2-369, MCA, a person may not appropriate water or commence construction of diversion, impoundment, withdrawal, or related distribution works except by applying for and receiving a permit from the Department. See § 85-2-102(1), MCA. An applicant in a beneficial water use permit proceeding must affirmatively prove all of the applicable criteria in § 85-2-311, MCA. Section § 85-2-311(1) states in relevant part:

… the department shall issue a permit if the applicant proves by a preponderance of evidence that the following criteria are met:

(a) (i) there is water physically available at the proposed point of diversion in the amount that the applicant seeks to appropriate; and

(ii) water can reasonably be considered legally available during the period in which the applicant seeks to appropriate, in the amount requested, based on the records of the department and other evidence provided to the department. Legal availability is determined using an analysis involving the following factors:

(A) identification of physical water availability;

(B) identification of existing legal demands on the source of supply throughout the area of potential impact by the proposed use; and

(C) analysis of the evidence on physical water availability and the existing legal demands, including but not limited to a comparison of the physical water supply at the proposed point of diversion with the existing legal demands on the supply of water.

(b) the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state water reservation will not be adversely affected. In this subsection (1)(b), adverse effect must be determined based on a consideration of an applicant's plan for the exercise of the permit that demonstrates that the applicant's use of the water will be controlled so the water right of a prior appropriator will be satisfied;

(c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;

(d) the proposed use of water is a beneficial use;

(e) the applicant has a possessory interest or the written consent of the person with the possessory interest in the property where the water is to be put to beneficial use, or if the proposed use has a point of diversion, conveyance, or place of use on national forest system lands, the applicant has any written special use authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of water under the permit;

(f) the water quality of a prior appropriator will not be adversely affected;

(g) the proposed use will be substantially in accordance with the classification of water set for the source of supply pursuant to 75-5-301(1); and

(h) the ability of a discharge permit holder to satisfy effluent limitations of a permit issued in accordance with Title 75, chapter 5, part 4, will not be adversely affected.

(2) The applicant is required to prove that the criteria in subsections (1)(f) through (1)(h) have been met only if a valid objection is filed. A valid objection must contain substantial credible information establishing to the satisfaction of the department that the criteria in subsection (1)(f), (1)(g), or (1)(h), as applicable, may not be met. For the criteria set forth in subsection (1)(g), only the department of environmental quality or a local water quality district established under Title 7, chapter 13, part 45, may file a valid objection.

To meet the preponderance of evidence standard, "the applicant, in addition to other evidence demonstrating that the criteria of subsection (1) have been met, shall submit hydrologic or other evidence, including but not limited to water supply data, field reports, and other information developed by the applicant, the department, the U.S. geological survey, or the U.S. natural resources conservation service and other specific field studies." § 85-2-311(5), MCA (emphasis added). The determination of whether an application has satisfied the § 85-2-311, MCA criteria is committed to the discretion of the Department. Bostwick Properties, Inc. v. Montana Dept. of Natural Resources and Conservation, 2009 MT 181, ¶ 21. The Department is required grant a permit only if the § 85-2-311, MCA, criteria are proven by the applicant by a preponderance of the evidence. Id. A preponderance of evidence is "more probably than not." Hohenlohe v. DNRC, 2010 MT 203, ¶¶33, 35.

5. Pursuant to § 85-2-312, MCA, the Department may condition permits as it deems necessary to meet the statutory criteria:

> (1) (a) The department may issue a permit for less than the amount of water requested, but may not issue a permit for more water than is requested or than can be beneficially used without waste for the purpose stated in the application. The department may require modification of plans and specifications for the appropriation or related diversion or construction. The department may issue a permit subject to terms, conditions, restrictions, and limitations it considers necessary to satisfy the criteria listed in 85-2-311 and subject to subsection (1)(b), and it may issue temporary or seasonal permits. A permit must be issued subject to existing rights and any final determination of those rights made under this chapter.

E.g., Montana Power Co. v. Carey (1984), 211 Mont. 91, 96, 685 P.2d 336, 339 (requirement to grant applications as applied for, would result in, "uncontrolled development of a valuable natural resource" which "contradicts the spirit and purpose underlying the Water Use Act."); see also, *In the Matter of Application for Beneficial Water Use Permit No. 65779-76M by Barbara L. Sowers* (DNRC Final Order 1988)(conditions in stipulations may be included if it further compliance with statutory criteria); *In the Matter of Application for Beneficial Water Use Permit No. 42M-80600 and Application for Change of Appropriation Water Right No. 42M-036242 by Donald H. Wyrick* (DNRC Final Order 1994); Admin. R. Mont. (ARM) 36.12.207.

6. The Montana Supreme Court further recognized in Matter of Beneficial Water Use Permit Numbers 66459-76L, Ciotti: 64988-G76L, Starner (1996), 278 Mont. 50, 60-61, 923 P.2d 1073, 1079, 1080, *superseded by legislation on another issue*:

> Nothing in that section [85-2-313], however, relieves an applicant of his burden to meet the statutory requirements of § 85-2-311, MCA, before DNRC may issue that provisional permit. Instead of resolving doubts in favor of appropriation, the Montana Water Use Act requires an applicant to make explicit statutory showings that there are unappropriated waters in the source of supply, that the water rights of a prior appropriator will not be adversely affected, and that the proposed use will not unreasonably interfere with a planned use for which water has been reserved.

See also, Wesmont Developers v. DNRC, CDV-2009-823, First Judicial District Court, *Memorandum and Order* (2011). The Supreme Court likewise explained that:

> .... unambiguous language of the legislature promotes the understanding that the Water Use Act was designed to protect senior water rights holders from encroachment by junior appropriators adversely affecting those senior rights.

Montana Power Co., 211 Mont. at 97-98, 685 P.2d at 340; see also Mont. Const. art. IX §3(1).

7. An appropriation, diversion, impoundment, use, restraint, or attempted appropriation, diversion, impoundment, use, or restraint contrary to the provisions of § 85-2-311, MCA is invalid. An officer, agent, agency, or employee of the state may not knowingly permit, aid, or assist in any manner an unauthorized appropriation, diversion, impoundment, use, or other restraint. A person or corporation may not, directly or indirectly, personally or through an agent, officer, or employee, attempt to appropriate, divert, impound, use, or otherwise restrain or control waters within the boundaries of this state except in accordance with this § 85-2-311, MCA. § 85-2-311(6), MCA.

8. The Department may take notice of judicially cognizable facts and generally recognized technical or scientific facts within the Department's specialized knowledge, as specifically identified in this document. ARM 36.12.221(4).

Physical Availability

FINDINGS OF FACT

9. The Department granted a variance to the Applicants on February 3, 2021, based on a recommendation of Attila Folnagy, Department Groundwater Hydrologist. The variance relieved the Applicants from complying with two administrative rules pertaining to Aquifer Testing Requirements.

1. ARM 36.12.121(3)(c) Discharge rate must be measured with a reliable measuring device and recorded with clock time according to the schedule on Form 633;[2] and
2. ARM 36.12.121(3)(h) One or more observation wells must be completed in the same water bearing zone(s) or aquifer as the proposed production well and close enough to the production well so that drawdown is measurable and far enough that well hydraulics do not affect the observation well. If existing wells are monitored they must not be pumped, or if pumped should be monitored at a frequency necessary to separate the effects of the pumping.[3]

10. The proposed production well was completed in 2012 by Central Drilling, Inc., a Montana licensed water well contractor. The well is 2003 feet in depth and completed in a 50-foot aquifer within the Third Cat Creek Member of the Kootenai Formation. The well has been monitored since it began supplying water for stock purposes for James and Lorraine Peterson in 2012 (Groundwater Certificate No. 41S 30063553). It has a closed-in pressure of 130 pounds per square inch, resulting in a static water level of approximately 300 feet above ground surface. It has supplied the existing purpose of Stock at a flow rate of 35 GPM since 2012. Application.

11. The Kootenai Formation is generally 330 to 400 feet thick and one of the most productive and widespread aquifers in the Judith Basin. Zones known as the second and third Cat Creek sandstones in the lower portion of the Kootenai Formation tend to be more productive than the upper portion of the formation. Wells generally flow at the surface (artesian) with shut-in

[2] Discharge was not recorded for a period of 8 hours during the aquifer test (from 600-1,080 minutes).

[3] There are no other nearby, existing wells that withdraw water from the same water bearing zone as the proposed production well, and the cost of completion of a monitoring well is prohibitive.

pressures than can reach up to 200 pounds per square inch and produce moderate volumes of water. Department Aquifer Test Report.

12. The Applicant provided an aquifer testing addendum, an aquifer test data form (Form 633), and a preliminary hydraulic assessment with the application. The information was utilized by a Department Groundwater Hydrologist (Folnagy) to assess physical water availability for the proposed project. Department Aquifer Testing Variance, February 3, 2021.

13. A 24-hour aquifer test was conducted on the proposed production well on August 10-11, 2020. The pumping rate for the test was 35 GPM (the proposed flow rate), as measured using a Neptune flow meter with totalizer. The flow rate did not fluctuate during the test. Drawdown of 593.4 feet below the static shut-in head of -301.8 feet below top of casing (a negative shut-in head represents a water level above land surface, or 301.8 feet above land surface) occurred during the test, leaving 1,658 feet of water column above the top of well perforations. Application; Department Aquifer Test Report.

14. Department Groundwater Hydrologist Attila Folnagy conducted further modeling for the period of diversion using the Theis (1935) solution, accounting for the proposed appropriation (42.01 AF) as well as the existing appropriation under Groundwater Certificate No. 41S 30063553 (up to 10 AF). Folnagy's modeling showed that predicted drawdown in the pumping well, including well loss (well efficiency losses), is 782.6 feet, for a remaining available water column above well perforations of 1,469.2 feet. Department Aquifer Test Report.

15. Using the Theis Solution (1935) and data collected from other aquifer tests conducted in the area, an evaluation of physical groundwater availability was completed by calculating groundwater flow or flux through a zone-of-influence (ZOI) corresponding to the 0.01-foot drawdown contour.[4] Groundwater flux is the rate of discharge or flow of groundwater through a porous or fractured media. Modeling analysis by Folnagy included a transmissivity of 45.1 ft2/day and a storativity value of 0.00015, and a constant pumping rate of 26 GPM (equivalent to the diverted volume of 42.01 AF averaged over the period of diversion and converted to flow

[4] The calculated ZOI occurs at a radius of 46,900 feet, or a width of 93,800 feet, from the proposed well, however, this contour level extends past the aquifer boundaries. Therefore, the ZOI was truncated to the source aquifer boundary at an average width of 75,000 feet.

rate). For the calculation of groundwater flux only, an average transmissivity of 190 ft2/day was chosen and assumed to better represent the regional transmissivity. The calculation resulted in groundwater flow or flux through the ZOI of 142,500 ft3/day, or 1,194 AF per year. The calculated flux exceeds the proposed volume of 42.01 AF per year. See Aquifer Test Report for further discussion and calculations.

16. The Department finds that aquifer testing and modeling results show groundwater is physically available in the amount proposed to sustain the beneficial use.

CONCLUSIONS OF LAW

17. Pursuant to § 85-2-311(1)(a)(i), MCA, an applicant must prove by a preponderance of the evidence that "there is water physically available at the proposed point of diversion in the amount that the applicant seeks to appropriate."

18. It is the applicant's burden to produce the required evidence. *In the Matter of Application for Beneficial Water Use Permit No. 27665-41I by Anson* (DNRC Final Order 1987)(applicant produced no flow measurements or any other information to show the availability of water; permit denied); *In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC.*, (DNRC Final Order 2005).

19. An applicant must prove that at least in some years there is water physically available at the point of diversion in the amount the applicant seeks to appropriate. *In the Matter of Application for Beneficial Water Use Permit No. 72662s76G by John Fee and Don Carlson* (DNRC Final Order 1990); *In the Matter of Application for Beneficial Water Use Permit No. 85184s76F by Wills Cattle Co. and Ed McLean* (DNRC Final Order 1994).

20. The Applicants have proven that water is physically available at the proposed point of diversion in the amount Applicant seeks to appropriate. § 85-2-311(1)(a)(i), MCA. (FOF 9-16)

Legal Availability

FINDINGS OF FACT

Groundwater

21. Based on the 0.01-foot drawdown contour and as truncated to the aquifer boundary, the predicted radius of the ZOI is 37,500 feet from the point of diversion, or an average aquifer width of 75,000 feet perpendicular to groundwater flow. Groundwater flux through the ZOI is calculated to be 1,194 AF per year. Department Aquifer Test Report.

22. According to Department records, there are 119 water rights within the ZOI that appropriate groundwater from the source aquifer or have no well log record.[5] Of the 119 groundwater rights, 94 are lacking a specific depth associated with the well. That is, the records do not contain a well log or other information to determine the completed depth of the well. It is a reasonable assumption that many of these wells are not completed in the same source aquifer (Kootenai Aquifer) as the proposed production well, and therefore the Department's analysis is conservative by including them in a legal demand calculation. Water right records. The total volume associated with the 119 water rights is 1,026.5 AF. By comparison, the estimated flux through the ZOI, or volume of water physically available annually, is 1,194 AF, leaving 167.5 AF legally available. Department Technical Report.

TABLE 1: GROUNDWATER LEGAL DEMANDS COMPARISON

Physically Available (AF/year)	**Existing Legal Demands (AF/year)**	**Physically Available-Existing Legal Demands (AF/year)**
1,194.0	1,026.5	167.5

23. The Department finds that groundwater is legally available in the amount requested under the proposed project.

Surface Water

24. The proposed use from the groundwater well will deplete surface water by reducing discharge directly from the source aquifer and/or by reducing seepage upward through overlying

[5] An accounting of the 119 existing water rights is located in the application file and identified as Exhibit A.

geologic strata (Colorado Group). Mapped geologic structures indicate hydraulic connections between the source aquifer and surface waters of the Missouri River and lower reaches of the Judith River. Reduced groundwater discharge will be spread over numerous small springs and diffuse seepage at unknown locations in the Judith Basin, and depletion of surface water by the proposed use will accumulate to the Judith River downstream of its confluence with Wolf Creek and the Missouri River. The potential area of surface water impact is determined to be the Judith River downstream of Wolf Creek and the Missouri River. Department Depletion Report; Department Technical Report.

25. The hydraulically connected reaches of the Judith River and Missouri River are predicted to experience constant depletions from the pumping well of 26 gallons per minute, which is equivalent to the proposed volume of 42.01 AF averaged over the period of diversion and converted to flow rate. Department Depletion Report.

26. Legal Demands Analysis - Judith River - The proposed diversion is located roughly 54 linear miles south of the confluence of the Judith River with Wolf Creek (the starting point of the depleted reach of the Judith River). The Missouri River lies 8.4 linear miles north of the Judith River and its confluence with Wolf Creek. Depletions from the Applicants' pumping well will eventually manifest in the 8.4-mile reach of the Judith River and the Missouri River. The following table – Table 2 - represents legal demands, on the Judith River within the depleted reach. Department Technical Report.

TABLE 2: SUMMARY OF SURFACE WATER RIGHTS - JUDITH RIVER, BELOW THE WOLF CREEK CONFLUENCE TO THE MISSOURI RIVER (AS CLAIMED, DECREED FOR ADJUDICATION PURPOSES OR AUTHORIZED BY THE DEPARTMENT)

Water Right	Purpose	Period of diversion	Flow Rate	Volume
41S 135366 00	IRRIGATION	05/01 to 09/30	11.18 CFS	1,475 AF
41S 135367 00	IRRIGATION	05/01 to 09/30	9.51 CFS	1,255 AF
41S 135517	IRRIGATION	05/01 to 09/30	2.66 CFS	251.7 AF
41S 135519	IRRIGATION	05/01 to 09/30	2.31 CFS	2,18.4 AF

41S 139679	IRRIGATION	05/01 to 09/30	11.18 CFS	1,475 AF
41S 30017492	INSTREAM FLOW	01/01 to 12/31	160 CFS	115,826.82 AF
41S 30064862	INSTREAM FLOW	01/01 to 12/31		
41S 48419 00	IRRIGATION	04/20 to 10/01	1.24 CFS	161 AF
41S 30107271	STOCK	01/01 to 12/31	0.08 CFS	15.47 AF*
41S 30107272	STOCK	01/01 to 12/31	0.08 CFS	6.03 AF*
41S 30143517	STOCK	01/01 to 12/31	0.08 CFS	1.18 AF*
41S 30140889	STOCK	01/01 to 12/31	0.08 CFS	1.18 AF*
41S 30140896	STOCK	01/01 to 12/31	0.08 CFS	0.40 AF*
41S 135370 00	IRRIGATION	05/01 to 09/30	2.2 CFS	307.4 AF
41S 135371 00	IRRIGATION	05/01 to 09/30	3.15 CFS	412 AF
41S 135374 00	IRRIGATION	05/01 to 09/30	5.99 CFS	790 AF
41S 135376 00	IRRIGATION	05/01 to 09/30	5 CFS	580 AF
41S 135377 00	IRRIGATION	05/01 to 09/30	3.98 CFS	556.5 AF
41S 135378 00	IRRIGATION	05/01 to 09/30	4.74 CFS	625 AF
41S 128235 00	STOCK	01/01 to 12/31	0.08 CFS	2.02*
41S 135365 00	IRRIGATION	05/01 to 09/30	5.69 CFS	600 AF
41S 135372 00	IRRIGATION	05/01 to 09/30	0.15 CFS	21.2 AF
41S 135373 00	IRRIGATION	05/01 to 09/30	0.23 CFS	69.7 AF
41S 135375 00	IRRIGATION	05/01 to 09/30	19.73 CFS	5,987.5 AF
41S 135400 00	IRRIGATION	05/01 to 09/30	6.69 CFS	97 AF
41S 135368 00	IRRIGATION	05/01 to 09/30	6.06 CFS	640 AF
Totals			**262.2 CFS**	**131,375.5 AF**

*Statements of Claim for Stock purposes are based on the number of animal units claimed at 30 gallons per day per animal unit (Montana Supreme Court Claim Examination Rules; Rule 24(c)).

27. Roughly mid-way between the upper and lower parts of the depleted reach of the Judith River is U.S. Geological Survey (USGS) stream gage number 06114700 (Judith River nr mouth, nr Winifred MT). The USGS gage has been in place and recording flows in the river for about 21 years. The gage is located 3.5 miles downstream of the confluence of the Judith River and Wolf Creek. The following two tables – Tables 3 and 4 - display stream discharge (flow rate and volume) of the Judith River at its confluence with Wolf Creek, based on flow records at the USGS gage and adjusted for water right diversions. Department Technical Report.

TABLE 3: ESTIMATED MEDIAN OF THE MEAN MONTHLY DISCHARGE OF THE JUDITH RIVER AT ITS CONFLUENCE WITH WOLF CREEK IN CUBIC FEET PER SECOND (CFS) (21 YEARS OF RECORD).

Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
251.4	257.3	608.1	558.3	842.1	875.9	396.0	341.4	386.5	364.9	263.3	235.4

TABLE 4: ESTIMATED MEDIAN OF THE MEAN MONTHLY DISCHARGE OF THE JUDITH RIVER AT ITS CONFLUENCE WITH WOLF CREEK IN ACRE-FEET (AF) (21 YEARS OF RECORD).

Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
15452.8	14798.2	37385.4	33171.9	51769.9	52114.1	24343.4	20983.1	22989.8	22434.7	15665.4	14472.1

28. The following table - Table 5 – provides a comparison summary of the data displayed in above Tables 2, 3 and 4. The summary shows water that is estimated to be physically available in the Judith River at its confluence with Wolf Creek, compared to legal demands on the Judith River. Department Technical Report.

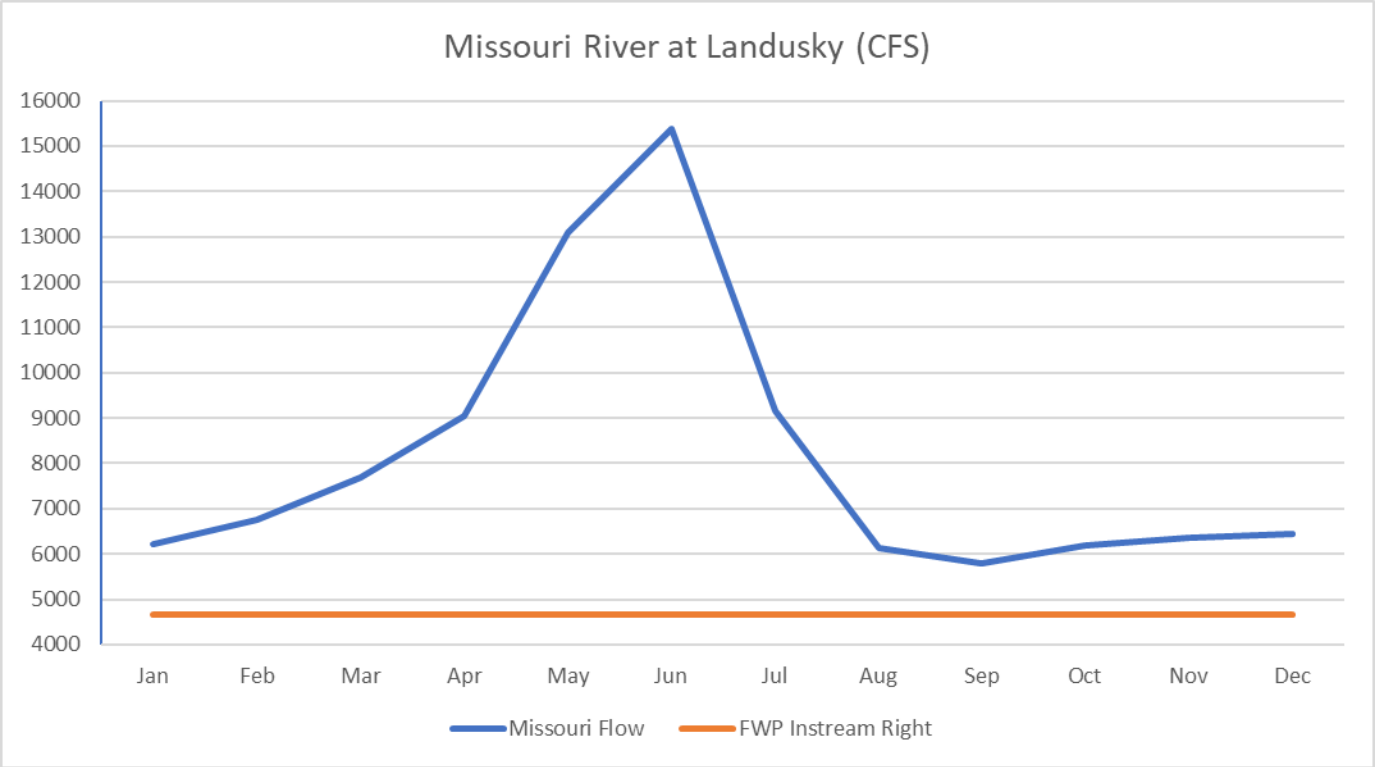
TABLE 5: WATER ESTIMATED TO BE PHYSICALLY AVAILABLE IN THE JUDITH RIVER AT THE CONFLUENCE WITH WOLF CREEK MINUS MONTHLY LEGAL DEMANDS DOWNSTREAM TO THE MISSOURI RIVER.

Month	Estimated Physical Availability (CFS)	Existing Legal Demands (CFS)	Physically Available – Existing Legal Demands (CFS)	Estimated Physical Availability (AF)	Existing Legal Demands (AF)	Physically Available – Existing Legal Demands (AF)
January	251.4	160.5	90.9	15,452.8	9,853.0	5,599.8
February	257.3	160.5	96.8	14,798.2	9,217.3	5,580.8
March	608.1	160.5	447.6	37,385.4	9,853.0	27,532.4
April	558.3	161.8	396.5	33,171.9	9,562.3	23,609.6
May	842.1	262.2	579.9	51,769.9	15,789.4	35,980.5
June	875.9	262.2	613.7	52,114.1	15,270.0	36,844.1
July	396.0	262.2	133.8	24,343.4	15,789.4	8,553.9
August	341.4	262.2	79.2	20,983.1	15,789.4	5,193.6
September	386.5	262.2	124.3	22,989.8	15,270.0	7,719.8
October	364.9	160.5	204.4	22,434.7	9,853.0	12,581.8
November	263.3	160.5	102.8	15,665.4	9,535.2	6,130.3
December	235.4	160.5	74.9	14,472.1	9,853.0	4,619.1

29. The summary data reflected in Table 5 (Finding of Fact No. 28) show that stream flows in the Judith River exceed water right legal demands, in both a flow rate and volume basis, during every month of the year. The comparison shows that flows exceed legal demands by a low of 74.9 CFS (4,619 AF) in December to a high of 613.7 CFS (36,844 AF) in June. Based on these data, the Department finds that surface water is legally available in the depleted reach of the Judith River during all months.

30. Legal Demands Analysis - Missouri River – The Judith River discharges into the Missouri River, and therefore depletions to the Judith River will also accrue to the Missouri River. The USGS operates a stream gage on the Missouri River downstream of the Judith River confluence. The Landusky Gage (No. 06115200) is located approximately 60 miles downstream of the Judith River and includes a period of record of 87 years. The data account for water rights (legal demands) that have been diverted between the Judith River and the gage, however further assessment of the instream flow legal demand of DFWP is warranted. The following graph

displays median of the mean monthly flows in the Missouri River and a comparison to DFWPs instream flow reservation.[6]



31. The graph (Finding of Fact No. 30) shows that median of the mean monthly stream flows in the Missouri River, in the depleted reach of its confluence with the Judith River, exceed water right legal demands, including DFWPs water reservation, during every month of the year. The comparison shows that flows exceed legal demands by a minimum of over 1,100 CFS. Based on this data, the Department finds that surface water is legally available in the depleted reach of the Missouri River. Department Technical Report.

CONCLUSIONS OF LAW

32. Pursuant to § 85-2-311(1)(a), MCA, an applicant must prove by a preponderance of the evidence that:

[6] DFWPs instream flow water reservation is 4,652 CFS at the Landusky Gage.

(ii) water can reasonably be considered legally available during the period in which the applicant seeks to appropriate, in the amount requested, based on the records of the department and other evidence provided to the department. Legal availability is determined using an analysis involving the following factors:

(A) identification of physical water availability;

(B) identification of existing legal demands on the source of supply throughout the area of potential impact by the proposed use; and

(C) analysis of the evidence on physical water availability and the existing legal demands, including but not limited to a comparison of the physical water supply at the proposed point of diversion with the existing legal demands on the supply of water.

E.g., ARM 36.12.101 and 36.12.120; Montana Power Co., 211 Mont. 91, 685 P.2d 336 (Permit granted to include only early irrigation season because no water legally available in late irrigation season); *In the Matter of Application for Beneficial Water Use Permit No. 81705-g76F by Hanson* (DNRC Final Order 1992).

33. It is the applicant's burden to present evidence to prove water can be reasonably considered legally available. Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 7 (the legislature set out the criteria (§ 85-2-311, MCA) and placed the burden of proof squarely on the applicant. The Supreme Court has instructed that those burdens are exacting.); see also Matter of Application for Change of Appropriation Water Rights Nos. 101960-41S and 101967-41S by Royston (1991), 249 Mont. 425, 816 P.2d 1054 (burden of proof on applicant in a change proceeding to prove required criteria); *In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC.*, (DNRC Final Order 2005))(it is the applicant's burden to produce the required evidence.); *In the Matter of Application for Beneficial Water Use Permit No. 41H 30023457 by Utility Solutions, LLC* (DNRC Final Order 2007)(permit denied for failure to prove legal availability); see also ARM 36.12.1705.

34. Pursuant to Montana Trout Unlimited v. DNRC, 2006 MT 72, 331 Mont. 483, 133 P.3d 224, the Department recognizes the connectivity between surface water and ground water and the effect of pre-stream capture on surface water. E.g., Wesmont Developers v. DNRC, CDV-2009-823, Montana First Judicial District Court, *Memorandum and Order*, (2011) Pgs. 7-8; *In the Matter of Beneficial Water Use Permit Nos. 41H 30012025 and 41H 30013629 by Utility*

Solutions LLC (DNRC Final Order 2006)(mitigation of depletion required), *affirmed*, Faust v. DNRC et al., Cause No. CDV-2006-886, Montana First Judicial District (2008); see also Robert and Marlene Takle v. DNRC *et al.*, Cause No. DV-92-323, Montana Fourth Judicial District for Ravalli County, *Opinion and Order* (June 23, 1994) (affirming DNRC denial of Applications for Beneficial Water Use Permit Nos. 76691-76H, 72842-76H, 76692-76H and 76070-76H; underground tributary flow cannot be taken to the detriment of other appropriators including surface appropriators and ground water appropriators must prove unappropriated surface water, *citing* Smith v. Duff, 39 Mont. 382, 102 P. 984 (1909), and Perkins v. Kramer, 148 Mont. 355, 423 P.2d 587 (1966)); *In the Matter of Beneficial Water Use Permit No. 80175-s76H by Tintzman* (DNRC Final Order 1993)(prior appropriators on a stream gain right to natural flows of all tributaries in so far as may be necessary to afford the amount of water to which they are entitled, *citing* Loyning v. Rankin (1946), 118 Mont. 235, 165 P.2d 1006; Granite Ditch Co. v. Anderson (1983), 204 Mont. 10, 662 P.2d 1312; Beaverhead Canal Co. v. Dillon Electric Light & Power Co. (1906), 34 Mont. 135, 85 P. 880); *In the Matter of Beneficial Water Use Permit No.* 63997-*42M by Joseph F. Crisafulli* (DNRC Final Order 1990)(since there is a relationship between surface flows and the ground water source proposed for appropriation, and since diversion by applicant's well appears to influence surface flows, the ranking of the proposed appropriation in priority must be as against all rights to surface water as well as against all groundwater rights in the drainage.) Because the applicant bears the burden of proof as to legal availability, the applicant must prove that the proposed appropriation will not result in prestream capture or induced infiltration and cannot limit its analysis to ground water.§ 85-2-311(a)(ii), MCA. Absent such proof, the applicant must analyze the legal availability of surface water in light of the proposed ground water appropriation. *In the Matter of Application for Beneficial Water Use Permit No. 41H 30023457 By Utility Solutions LLC* (DNRC Final Order 2007) (permit denied); *In the Matter of Application for Beneficial Water Use Permit No. 76H-30028713 by Patricia Skergan and Jim Helmer* (DNRC Final Order 2009); Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision,* (2011) Pg. 5 ;

Wesmont Developers v. DNRC, CDV-2009-823, First Judicial District Court, *Memorandum and Order*, (2011) Pgs. 11-12.

35. Where a proposed ground water appropriation depletes surface water, applicant must prove legal availability of amount of depletion of surface water throughout the period of diversion either through a mitigation /aquifer recharge plan to offset depletions or by analysis of the legal demands on, and availability of, water in the surface water source. Robert and Marlene Takle v. DNRC *et al.*, Cause No. DV-92-323, Montana Fourth Judicial District for Ravalli County, *Opinion and Order* (June 23, 1994); *In the Matter of Beneficial Water Use Permit Nos. 41H 30012025 and 41H 30013629 by Utility Solutions LLC* (DNRC Final Order 2006)(permits granted), *affirmed*, Faust v. DNRC et al., Cause No. CDV-2006-886, Montana First Judicial District (2008); *In the Matter of Application for Beneficial Water Use Permit 41H 30019215 by Utility Solutions LLC* (DNRC Final Order 2007*)*(permit granted), *affirmed*, Montana River Action Network et al. v. DNRC et al., Cause No. CDV-2007-602, Montana First Judicial District (2008); *In the Matter of Application for Beneficial Water Use Permit No. 41H 30023457 by Utility Solutions LLC* (DNRC Final Order 2007) (permit denied for failure to analyze legal availability outside of irrigation season (where mitigation applied)); *In the Matter of Application for Beneficial Water Use Permit No. 41H 30026244 by Utility Solutions LLC* (DNRC Final Order 2008); *In the Matter of Application for Beneficial Water Use Permit No. 76H-30028713 by Patricia Skergan and Jim Helmer* (DNRC Final Order 2009)(permit denied in part for failure to analyze legal availability for surface water depletion); Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 5 (Court affirmed denial of permit in part for failure to prove legal availability of stream depletion to slough and Beaverhead River); Wesmont Developers v. DNRC, CDV-2009-823, First Judicial District Court, *Memorandum and Order*, (2011) Pgs. 11-12 ("DNRC properly determined that Wesmont cannot be authorized to divert, either directly or indirectly, 205.09 acre-feet from the Bitterroot River without establishing that the water does not belong to a senior appropriator"; applicant failed to analyze legal availability of surface water where projected surface water depletion from groundwater pumping); *In the Matter of Application for Beneficial Water Use Permit No. 76D-*

30045578 by GBCI Other Real Estate, LLC (DNRC Final Order 2011) (in an open basin, applicant for a new water right can show legal availability by using a mitigation/aquifer recharge plan or by showing that any depletion to surface water by groundwater pumping will not take water already appropriated; development next to Lake Koocanusa will not take previously appropriated water). Applicant may use water right claims of potentially affected appropriators as a substitute for "historic beneficial use" in analyzing legal availability of surface water under § 85-2-360(5), MCA. Royston, supra.

36. In analyzing legal availability for surface water, applicant was required to evaluate legal demands on the source of supply throughout the "area of potential impact" by the proposed use under §85-2-311(1)(a)(ii), MCA, not just within the "zone of influence." Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 6.

37. Use of published upstream gauge data minus rights of record between gauge and point of diversion adjusted to remove possible duplicated rights shows water physically available. Using same methodology and adding rights of record downstream of point of diversion to the mouth of the stream shows water legally available. *In the Matter of Application for Beneficial Water Use Permit No. 41P-105759 by Sunny Brook Colony* (DNRC Final Order 2001); *In the Matter of Application for Beneficial Water Use Permit No. 81705-g76F by Hanson* (DNRC Final Order 1992);

38. Applicants have proven by a preponderance of the evidence that water can reasonably be considered legally available during the period in which the applicant seeks to appropriate, in the amount requested, based on the records of the Department and other evidence provided to the Department.§ 85-2-311(1)(a)(ii), MCA. (FOF 21-31)

Adverse Effect

FINDINGS OF FACT

39. Generally, the Applicants' plan to prevent adverse effects includes the installation of a flow meter on the watering system to account for appropriations from the groundwater well, and regulation of the diversion works in times of water shortage to satisfy prior appropriators. The

Applicants state they will make alternative arrangements to satisfy their stock water needs should a senior appropriator file written notification demonstrating their water right(s) are being adversely affected. Application.

40. Groundwater - An evaluation of drawdown in other/existing wells within the 1-foot drawdown contour was conducted by Attila Folnagy using the Theis (1935) solution with the following parameters: Transmissivity = 45.1 ft2/day, Storativity = 0.00015, and a constant pumping rate of 26.0 gallons per minute. The Department's modeling shows that after five years of an assumed monthly pumping schedule, drawdown in excess of 1 foot extends up to 55,800 feet from the proposed well; however, it is truncated to the aquifer boundaries to the southwest and east of the proposed point of diversion. There are 165 groundwater rights predicted to experience 1 foot or more of drawdown. The drawdown impact to these 165 water rights ranges between 1 and 30 feet. The file contains a list of these water rights (Appendix A). Department Aquifer Test Report.

41. The closest well assessed for adverse effects is approximately 1.2 miles from the production well, while the farthest well is almost 10.5 miles away. Of the 165 wells that are estimated to experience drawdown greater than one foot, only 34 have well logs or other information with which to judge impacts. Those 34 wells range in completed depths of 100 feet to 2,003 feet. The remaining 131 wells have no depth or pumping level information associated with their records to determine drawdown impacts. Department Technical Report.

42. Of the 34 wells within the 1-foot drawdown contour (those with records available to determine well depth), the modeled available drawdown to each existing well after five years of pumping the proposed well ranges between 76 feet and 2,272 feet. Drawdown from the proposed appropriation is not projected to create adverse effects to these existing water users. Department Aquifer Test Report.

43. Based on information included in the application and the Department's Groundwater Hydrologist's assessment, the Department finds that groundwater rights will not be adversely affected by the proposed appropriation.

44. Surface Water - Water is physically and legally available in the Judith River and Missouri River (the hydraulically connected surface water sources) in all months of the year. Based on an assessment of stream gaging data and water right records, median of the mean monthly flows in the Judith River exceed legal demands by more than 74.9 CFS (December is the lowest flow month). Analysis of flows in the Missouri River shows that discharge exceeds legal demands by more than 1,100 CFS during the lowest flow month (September). Department Technical Report.

45. The Department finds there will be no adverse effect to water rights in hydraulically connected surface waters.

CONCLUSIONS OF LAW

46. Pursuant to § 85-2-311(1)(b), MCA, the Applicant bears the affirmative burden of proving by a preponderance of the evidence that the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state water reservation will not be adversely affected. Analysis of adverse effect must be determined based on a consideration of an applicant's plan for the exercise of the permit that demonstrates that the applicant's use of the water will be controlled so the water right of a prior appropriator will be satisfied. See Montana Power Co. (1984), 211 Mont. 91, 685 P.2d 336 (purpose of the Water Use Act is to protect senior appropriators from encroachment by junior users); Bostwick Properties, Inc. ¶ 21.

47. An applicant must analyze the full area of potential impact under the § 85-2-311, MCA criteria. *In the Matter of Beneficial Water Use Permit No. 76N-30010429 by Thompson River Lumber Company* (DNRC Final Order 2006). While § 85-2-361, MCA, limits the boundaries expressly required for compliance with the hydrogeologic assessment requirement, an applicant is required to analyze the full area of potential impact for adverse effect in addition to the requirement of a hydrogeologic assessment. Id. ARM 36.12.120(5).

48. Applicant must prove that no prior appropriator will be adversely affected, not just the objectors. Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision,* (2011) Pg. 4.

49. In analyzing adverse effect to other appropriators, an applicant may use the water rights claims of potentially affected appropriators as evidence of their "historic beneficial use." See

Matter of Application for Change of Appropriation Water Rights Nos. 101960-41S and 101967-41S by Royston (1991), 249 Mont. 425, 816 P.2d 1054.

50. It is the applicant's burden to produce the required evidence. E.g., Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 7 (legislature has placed the burden of proof squarely on the applicant); *In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC.*, (DNRC Final Order 2005). (DNRC Final Order 2005). The Department is required to grant a permit only if the § 85-2-311, MCA, criteria are proven by the applicant by a preponderance of the evidence. Bostwick Properties, Inc. ¶ 21.

51. Section 85-2-311 (1)(b) of the Water Use Act does not contemplate a de minimis level of adverse effect on prior appropriators. Wesmont Developers v. DNRC, CDV-2009-823, First Judicial District Court, *Memorandum and Order*, (2011) Pg. 8.

52. The Department can and routinely does, condition a new permit's use on use of that special management, technology or measurement such as augmentation now generally known as mitigation and aquifer recharge. See § 85-2-312; § 85-2-360 et seq., MCA; see, e.g., *In the Matter of Beneficial Water Use Permit No. 107-41I by Diehl Development* (DNRC Final Order 1974) (No adverse effect if permit conditions to allow specific flow past point of diversion.); *In the Matter of Combined Application for Beneficial Water Use Permit No. 76H- 30043133 and Application No. 76H-30043132 to Change Water Right Nos. 76H-121640-00, 76H-131641-00 and 76H-131642-00 by the Town of Stevensville* (DNRC Final Order 2011).

53. Applicants have proven by a preponderance of the evidence that the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state water reservation will not be adversely affected. § 85-2-311(1)(b), MCA. (FOF 39-45)

Adequate Diversion

FINDINGS OF FACT

54. The proposed project consists of one groundwater well serving stock water to a cattle feedlot operation. The proposed appropriation is 35 GPM up to 42.01 AF annually. The well was drilled in 2012 by a Montana licensed water well contractor. Application.

55. The well is currently producing water for stock purposes (range cattle) under an existing appropriation (Groundwater Certificate No. 41S 30063553) at a flow rate of 35 GPM and volume of up to 10 AF. It has been serving the existing purpose since 2012. Application.

56. The well operates under artesian pressure (130 PSI) but will be installed with a submersible pump under the proposed use (7.5 horsepower Grundfos model pump or similar). The system will include a pump house, pressure tank, 3-inch water mainline, and at least 20 Thermosink Double Bowl waterers serving pens within the feedlot. Water will be conveyed from the wellhead via the 3-inch mainline to 0.75-inch supply lines to the stock waterers. A variable frequency drive pump will be used to regulate water supply to stock waterers and tanks on demand. The system will be operated with a flow regulator and meter to ensure it operates at its maximum design capacity of 35 GPM. Well and system design specifications are included in the file. Application.

57. A 24-hour aquifer test was conducted on the proposed production well on August 10-11, 2020. The pumping rate for the test was 35 GPM (the proposed flow rate), as measured using a Neptune flow meter with totalizer. The flow rate did not fluctuate during the test. Drawdown of 593.4 feet below the static shut-in head of -301.8 feet below top of casing (a negative shut-in head represents a water level above land surface, or 301.8 feet above land surface) occurred during the test, leaving 1,658 feet of water column above the top of well perforations. Further analysis by Department Groundwater Hydrologist Attila Folnagy was conducted to factor in the existing appropriation (41S 30063553) with the proposed appropriation to determine adequacy of the diversion works. Folnagy's modeling showed that predicted drawdown in the pumping well, including well loss (well efficiency losses), for both appropriations, is 782.6 feet, for a remaining

available water column above well perforations of 1,469.2 feet. Application; Department Aquifer Test Report.

58. The Department finds the proposed diversion is adequate for the proposed appropriation.

CONCLUSIONS OF LAW

59. Pursuant to § 85-2-311(1)(c), MCA, an Applicant must demonstrate that the proposed means of diversion, construction, and operation of the appropriation works are adequate.

60. The adequate means of diversion statutory test merely codifies and encapsulates the case law notion of appropriation to the effect that the means of diversion must be reasonably effective, i.e., must not result in a waste of the resource. *In the Matter of Application for Beneficial Water Use Permit No. 33983s41Q by Hoyt* (DNRC Final Order 1981); § 85-2-312(1)(a), MCA.

61. *Water wells must be constructed according to the laws, rules, and standards of the Board of Water Well Contractors to prevent contamination of the aquifer. In the Matter of Application for Beneficial Water Use Permit No.* 41I-105511 *by Flying J Inc.* (DNRC Final Order 1999).

62. Information needed to prove that proposed means of diversion, construction, and operation of the appropriation works are adequate varies, based upon project complexity design by licensed engineer adequate. *In the Matter of Application for Beneficial Water Use Permit No. 41C-11339900 by Three Creeks Ranch of Wyoming LLC* (DNRC Final Order 2002).

63. Specific ditch segments would be adequate after completion of maintenance and rehabilitation work. *In the Matter of Application for Beneficial Water Use Permit No. 43B-30002710 by USDA*. (DNRC Final Order 2005).

64. Applicants have proven by a preponderance of the evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate for the proposed beneficial use. § 85-2-311(1)(c), MCA (FOF 54-58).

Beneficial Use

FINDINGS OF FACT

65. The proposed beneficial use is for stock purposes at a commercial feedlot operation. The requested flow rate is 35 GPM and volume of 42.01 AF. The flow rate is based on measured data from an existing appropriation (Groundwater Certificate No. 41S 30063553) and a recently conducted aquifer testing procedure for the proposed appropriation. The flow rate of 35 GPM is required to meet peak Stock demands for 3,000 head of cattle at the feedlot. The volume of 42.01 AF is based on Department standards of 15 gallons per day per animal unit, at an estimated annual average stock occupancy rate of 2,500 cattle. The Applicant plans on installing a flow meter with totalizer to monitor water usage. Application.

66. The Department finds the proposed use to be beneficial.

CONCLUSIONS OF LAW

67. Under § 85-2-311(1)(d), MCA, an Applicant must prove by a preponderance of the evidence the proposed use is a beneficial use.

68. An appropriator may appropriate water only for a beneficial use. See also, § 85-2-301 MCA. It is a fundamental premise of Montana water law that beneficial use is the basis, measure, and limit of the use. E.g., McDonald, supra; Toohey v. Campbell (1900), 24 Mont. 13, 60 P. 396. The amount of water under a water right is limited to the amount of water necessary to sustain the beneficial use. E.g., Bitterroot River Protective Association v. Siebel, *Order on Petition for Judicial Review*, Cause No. BDV-2002-519, Montana First Judicial District Court, Lewis and Clark County (2003), *affirmed on other grounds*, 2005 MT 60, 326 Mont. 241, 108 P.3d 518; *In The Matter Of Application For Beneficial Water Use Permit No. 43C 30007297 by Dee Deaterly* (DNRC Final Order), *affirmed other grounds*, Dee Deaterly v. DNRC *et al*, Cause No. 2007-186, Montana First Judicial District, *Order Nunc Pro Tunc on Petition for Judicial Review* (2009); Worden v. Alexander (1939), 108 Mont. 208, 90 P.2d 160; Allen v. Petrick (1924), 69 Mont. 373, 222 P. 451; *In the Matter of Application for Beneficial Water Use Permit No. 41S-105823 by French* (DNRC Final Order 2000).

Amount of water to be diverted must be shown precisely. Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 3 (citing BRPA v. Siebel, 2005 MT 60, and rejecting applicant's argument that it be allowed to appropriate 800 acre-feet when a typical year would require 200-300 acre-feet).

69. Applicants propose to use water for stock purposes, which is a recognized beneficial use. § 85-2-102(5), MCA. "Stock use" by DNRC rule "means the use of water for livestock, including but not limited to cattle, horses, pigs, sheep, llamas, and animals owned and controlled on game farms. It does not include domestic animals such as dogs and cats or wild animals." ARM 36.12.101(72). Applicants have proven by a preponderance of the evidence stock is a beneficial use and that 42.01 AF of diverted volume and 35 GPM of water requested is the amount needed to sustain the beneficial use. § 85-2-311(1)(d), MCA, (FOF 65-66)

Possessory Interest

FINDINGS OF FACT

70. The Applicants signed the affidavit on the application form affirming the they have possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use. Application.

CONCLUSIONS OF LAW

71. Pursuant to § 85-2-311(1)(e), MCA, an Applicant must prove by a preponderance of the evidence that it has a possessory interest or the written consent of the person with the possessory interest in the property where the water is to be put to beneficial use, or if the proposed use has a point of diversion, conveyance, or place of use on national forest system lands, the applicant has any written special use authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of water under the permit.

72. Pursuant to ARM 36.12.1802:

> (1) An applicant or a representative shall sign the application affidavit to affirm the following:

(a) the statements on the application and all information submitted with the application are true and correct and
(b) except in cases of an instream flow application, or where the application is for sale, rental, distribution, or is a municipal use, or in any other context in which water is being supplied to another and it is clear that the ultimate user will not accept the supply without consenting to the use of water on the user's place of use, the applicant has possessory interest in the property where the water is to be put to beneficial use or has the written consent of the person having the possessory interest.
(2) If a representative of the applicant signs the application form affidavit, the representative shall state the relationship of the representative to the applicant on the form, such as president of the corporation, and provide documentation that establishes the authority of the representative to sign the application, such as a copy of a power of attorney.
(3) The department may require a copy of the written consent of the person having the possessory interest.

73. Applicants have proven by a preponderance of the evidence that it has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use. § 85-2-311(1)(e), MCA. (FOF 70)

PRELIMINARY DETERMINATION

Subject to the terms, analysis, and conditions in this Order, the Department preliminarily determines that this Application for Beneficial Water Use Permit No. 41S 30150713 should be **GRANTED**.

The Department determines the Applicant may divert groundwater by means of a well completed in the Kootenai Formation (2,003 feet deep well), located in the NENESE Section 2, T12N, R15E, Judith Basin County. The purpose of use is stock water to supply a concentrated animal feedlot operation (place of use) in the W2 Section 1, T12N, R15E. The period of diversion and use is from January 1 to December 31 at a flow rate of 35 GPM and volume of up to 42.01 AF.

NOTICE

This Department will provide public notice of this Application and the Department's Preliminary Determination to Grant pursuant to §§ 85-2-307, MCA. The Department will set a deadline for objections to this Application pursuant to §§ 85-2-307, and -308, MCA. If this Application receives no valid objection or all valid objections are unconditionally withdrawn, the Department will grant this Application as herein approved. If this Application receives a valid objection, the application and objection will proceed to a contested case proceeding pursuant to Title 2 Chapter 4 Part 6, MCA, and § 85-2-309, MCA. If valid objections to an application are received and withdrawn with stipulated conditions and the department preliminarily determined to grant the permit or change in appropriation right, the department will grant the permit or change subject to conditions necessary to satisfy applicable criteria.

DATED this 13th day of May 2021.

/Original signed by Scott Irvin/
Scott Irvin, Regional Manager
Lewistown Regional Office
Department of Natural Resources and Conservation

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the PRELIMINARY DETERMINATION TO GRANT was served upon all parties listed below on this 13th day of May 2021, by first class United States mail.

JAMES AND LORRAINE PETERSON
501 PETERSON RANCH LANE
BUFFALO, MT 59418

WATER & ENVIRONMENTAL TECHNOLOGIES
ATTENTION: JAMIE GRAHAM
EMAIL: JGRAHAM@WATERENVTECH.COM

_____ _____

NAME DATE